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CASES CITED

STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No.

W. E. HEDGER TRANSPORTATION CORPORATION,
Petitioner,

against

IRA S. BUSHEY & SONS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

W. E. Hedger Transportation Corporation prays that a writ of *certiorari* issue to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit (R. 220) entered in the case of *Ira S. Bushey & Sons, Inc.* v. *Barges B & B No. 5, et al.* and *W. E. Hedger Transportation Corporation,* on February 27, 1948,

affirming, by a divided court, the judgment of the District Court of the United States for the Eastern District of New York (BYERS, *J.*) which dismissed the proceeding without a trial of the merits.

The prevailing opinion and the dissenting opinion of Judge FRANK are reported *sub nomine Ira S. Bushey & Sons, Inc.* v. *W. E. Hedger Transportation Corp.*, in 167 F. (2d) at page 9.

The Circuit Court of Appeals entertained a motion for rehearing and filed its order denying the motion—without opinion—March 16, 1948 (R. 227-8).

Statement.

For the sake of brevity and clarity, the petitioner will be referred to as "Hedger" and the respondent as "Bushey".

The action was instituted on April 4, 1945, by a Bill in Equity (R. 116-140) to vacate and set aside for fraud a consent decree of foreclosure of a preferred ship mortgage held by Bushey upon a fleet of barges owned by Hedger, entered on the admiralty side in the Eastern District of New York, on March 8, 1945 (R. 113). The claimant in the foreclosure action (Hedger) had interposed a plea of *non indebitatus* to the libel and demanded an accounting of transactions between the parties and privies covering a period of about twelve years and involving over $1,000,000 in values as to which Bushey was in effect a trustee for Hedger.

The District Court dismissed the Bill on the ground that Hedger's only remedy lay by libel of review in admiralty. Upon appeal, the Circuit Court reversed (155 F. [2d] 321) and remanded the cause with instructions to treat the complaint as a petition in the foreclosure suit to re-open the decree upon the grounds therein alleged.

On the coming down of the mandate, the district judge proceeded thus: Before any answer to the petition had been

filed, and without hearing any evidence in support of the petition's allegations, he considered parts of the face of the petition and some of the previous record in the foreclosure suit. On that basis, he held that no duress or abuse of process appeared, and that the petition was therefore without merit. Accordingly, he entered an order dismissing the petition (and without leave to amend). In other words, the judge, of his own motion, acted as if Bushey had demurred (R. 23). This district judge was the same judge who entered the consent decree and whose conduct of the foreclosure proceeding prior to decree was criticized in the complaint as denying the claimant in the foreclosure action (Hedger) due process of law (R. 131).

Briefly stated, this is the case stated in the complaint:

The holder of a preferred ship mortgage (Bushey) was sued by the mortgagor (Hedger) in the State Court for an accounting between them covering transactions involving more than $1,000,000 paid to Bushey and its privies, in trust. Within two months after the accounting suit was brought, Bushey, knowing the ship mortgage had been fully paid, but desiring to force Hedger to abandon the State Court action for an accounting, libels and ties up Hedger's barges in a suit to foreclose, wrongfully claiming that some $70,000 is still owing under the mortgage and, by attaching the mortgaged vessels, stops Hedger's business for all practical purposes. Proof by Hedger that the mortgage has been paid will lead to a trial lasting several weeks. If, during those weeks, the vessels are idle because of the attachment, Hedger will suffer severe financial loss, and probably financial ruin. By giving a bond for some $70,000 Hedger can obtain the release of the vessels from the attachment. Hedger offers to give such a bond or deposit cash with the libellant (R. 92-3) on condition that thereupon (a) not only will the attachment be dissolved but also (b) Bushey will satisfy the mortgage of record. Bushey

rejects the second condition. The judge rules that, if a bond is given, it will release the attachment *only*, not the mortgage lien, and that, despite the filing of a bond, or deposit of cash, he will not direct Bushey to satisfy the mortgage. As Bushey knows, the financial condition of Hedger is such that it cannot give a bond for $69,491.56 or deposit that sum with Bushey, except through the aid of a certain bank. As Bushey also knows, the bank will supply such a bond, or make an advance to enable Hedger to pay the $69,491.56 if, but only if, simultaneously Bushey executes and delivers a satisfaction of the mortgage so that the bank can have an unclouded first mortgage on the vessels as security. Hedger tenders the $69,491.56 and Bushey at first indicates that, upon payment thereof, it will satisfy the mortgage and discontinue the action (R. 108-9). Subsequently, however, during recess, Bushey apparently realizes that the State accounting action would not thus be defeated, and refuses to execute and deliver such a satisfaction of the mortgage unless Hedger both consents to a decree and pays the wrongful $69,491.56 claim. Mere payment of the $69,491.56 without a consent, will not cause prompt termination of the suit, thereby freeing the vessels of both the attachment and the outstanding mortgage. For Bushey notifies Hedger that unless the latter both consents and pays, Bushey will amend the pleadings and claim $25,000 more (R. 135, 94). This will mean that, to bring the suit to an end without a long and ruinous trial, Hedger must either (a) consent to and comply with a $69,491.56 decree or (b) without a consent, pay some $95,000 which Hedger cannot obtain. Under this pressure, to save itself from financial ruin—even upon a successful defense to the foreclosure—Hedger yields, unwillingly consenting to a $69,491.56 decree and paying the $69,491.56 decreed. Within the term, Hedger filed its Bill of Complaint for vacation of the decree, an accounting and restitution of the amount thus paid to Bushey (R. 139).

A somewhat more extended statement of the case appears in Judge FRANK's dissenting opinion (R. 163-166). The complaint is printed in full at pages 116-140 of the Record.

To date, Hedger has been completely thwarted in getting any accounting of over $1,000,000 of its money and property paid over to Bushey and its privies in trust. The Record does not disclose why Bushey has been fighting so strenuously for over three years to evade an accounting.

The State Court has denied Bushey's subsequent motion to dismiss the action for an accounting on the ground of *res adjudicata* pending the outcome of this action to vacate the consent decree in the federal court.

The rank injustice to Hedger is clearly explained in a masterly dissenting opinion by Judge FRANK (R. 158-189) to which the Court is respectfully referred.

Specification of Errors.

Both Courts below erred:

1. In denying the petitioner a trial of the issues of duress and indebtedness.

2. In denying the petitioner relief from the abusive employment of the processes of the district court as successful coercive weapons against it.

3. In excluding from their consideration matters which were appropriate to a decision.

4. In misconstruing the Ship Mortgage Act, 1920 (46 U. S. C. §§ 911, *et seq.*), with respect to the general maritime law in actions *in rem* relieving the *res* of the lien upon the giving of security.

5. In denying relief in equity under the Bill of Complaint.

Questions Involved.

1. Whether a court should allow its processes to be employed abusively as coercive weapons.

2. Whether a decree may be vacated or modified, during or after the term, on the ground that it was obtained by duress, only when the duress was the equivalent of a threat of kidnapping the defendant's child.

3. Whether a consent decree may be vacated or modified, during or after the term, on the ground that the consent was procured by fraud through duress.

4. Whether a consent decree in admiralty, fraudulently procured by duress, may be vacated or modified in a proceeding in equity where the Bill prays elements of relief beyond the power of an admiralty court to afford.

5. Whether the distinction between an attack made on a decree or judgment during the term and one made thereafter is important.

6. Whether the maritime law as stated in *United States* v. *Ames,* 99 U. S. 35, releases the *res* from the lien of a preferred ship mortgage upon the filing or deposit of adequate security in court by the claimant; and whether such law requires the delivery by the holder of the mortgage to the mortgagor of the certificate of discharge required by § 925 (b) of the Ship Mortgage Act, 1920 (46 U. S. C. § 925 [b]) upon the deposit or filing of such security.

Reasons for Granting the Writ.

1. This case presents a novel question of duress and invasion of civil rights which is of great public importance.

2. The decisions of the lower courts herein were contrary to the decisions of this Court in *Lonergan* v. *Buford,*

148 U. S. 581, and *Union Pac. R. R. Co.* v. *Public Service Comm.*, 248 U. S. 67.

3. There is a conflict in principle and policy concerning the vacating of consent decrees between the decision in this case and the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Fleming* v. *Huebsch Laundry Corp.*, 159 F. (2d) 581.

4. The Ship Mortgage Act, 1920, should be construed (1) with respect to the delivery by the mortgagee of a formal discharge of a preferred ship mortgage on filing or deposit of adequate security in a foreclosure proceeding and (2) with respect to whether the statutory jurisdiction of the admiralty court survives, after satisfaction, a final decree of foreclosure therein.

5. With respect to duress and "business compulsion", the reasons stated by Judge FRANK, in his dissenting opinion (R. 188-189) are particularly pertinent:

> "The ruling of the majority here will create, I think, a most unfortunate precedent, which will permit one who thus uses litigation coercively to be unjustly enriched at the expense of his coerced victim. It ought, I think, to be the highest obligation of the courts to see to it that legal proceedings are not abusively exploited to deprive citizens of their rights. There is much discussion today, and justifiably, of the dangers to civil liberties through improper uses of power by executive and legislative agencies of Government. With such misbehavior by such agencies, the courts often, for a variety of reasons, cannot cope effectively, in which event rectification must be left to the electorate. But the courts can far more readily and expeditiously deal with abuses of court processes. Such abuses, occurring in their very own domain, should be a matter of lively and anxious concern to judges (especially

those appointed for life and thus insulated from a critical electorate). By keeping their own house in order, judges will set an example to other governmental officers.

It is unimaginative for judges, or anyone else, to regard the loss of civil liberties as confined to the direct loss of physical freedom or of free speech (or the like). For, if, in our kind of society, a man, coerced into submission to a false claim in a law suit, is deprived of his property or savings, he and his family may find themselves in such an impoverished condition that their legal freedoms—to move physically or to speak their minds—may dry up into pure formalities, devoid of all practical reality. * * * Things of the spirit (such as civil liberties and what they make possible) are, or should be, more precious than material things. Yet, for most mortals, the former can have little value in the complete absence of the latter."

WHEREFORE, it is respectfully submitted that this petition for a writ of *certiorari* to review the final judgment of the United States Circuit Court of Appeals for the Second Circuit hereinbefore described should be granted.

W. E. HEDGER TRANSPORTATION CORPORATION.

HORACE M. GRAY,
Advocate for Petitioner.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

HORACE M. GRAY,
Advocate for Petitioner.

BRIEF IN SUPPORT OF PETITION

I.

Opinions Below.

The opinion filed in the District Court appears at pages 7-24 of the Record and is reported in 70 Fed. Supp. 578.

The opinion of the Circuit Court of Appeals is reported at 167 F. (2d) 9, and appears at pages 141-220 of the Record.

II.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered February 27, 1948 (R. 220). Petition for re-argument was entertained and denied March 16, 1948 (R. 227). Jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, Ch. 229; 28 U. S. C. § 347).

III.

Specification of Errors to be Urged.

All of the errors set forth in the Specification of Errors (Petition, p. 5) will be urged.

The Statute Involved.

The statute involved is the Ship Mortgage Act, 1920 (41 Stat. 1000, Ch. 250, § 30). The pertinent provisions from subsections G (46 U. S. C. § 925 [b]) and K (46 U. S. C. § 951) are printed in the appendix *post*, page 18.

The Facts.

The facts are stated in the petition (*ante*, pp. 2-5) to which reference is made.

ARGUMENT

I.

The petitioner has been deprived of its day in Court through duress by means of abuse of process.

Hedger sought an accounting from Bushey, as trustee, of more than $1,000,000, in an action brought in the New York Supreme Court late in December, 1944, in which $600,000 damages were demanded.

Thereupon Bushey seized and immobilized Hedger's fleet of 31 barges worth over $250,000, on February 10, 1945, unjustly claiming some $70,000 to be due on a preferred ship mortgage secured on the barges. Hedger denied any indebtedness and offered to deposit cash with Bushey to release the fleet while trying out the question of indebtedness which, of course, would involve an accounting by Bushey. Bushey refused unless the accounting were abandoned.

Thus, the fundamental issue between the parties since 1944 has been: Does Hedger owe Bushey or does Bushey owe Hedger?

Bushey has evaded trying that issue and hopes to have laid it to rest as *res adjudicata* through this consent decree under attack which was forced from Hedger by duress through threats of imminent ruin and by abuse of process.

Duress by abuse of process is fraud.

City Nat'l Bank v. *Kusworm,* 91 Wis. 166;
Hodge v. *Wallace,* 129 Wis. 84;
Neibuhr v. *Gage,* 99 Minn. 149;
Smith v. *Blakesburg Savings Bank,* 182 Ia. 1190;
Brainard v. *Van Dyke,* 71 Vt. 359;
cf. *Restatement of Restitution,* § 70, comment a;
§ 128, comment d;
cf. *Cohen* v. *Randall,* 137 F. (2d) 441, 445.

This Court has repeatedly held that duress such as that existing in this case entitles the party coerced to relief.

> *United States* v. *Throckmorton*, 98 U. S. 61, 65;
> *Lonergan* v. *Buford*, 148 U. S. 581, 590;
> *Union Pac. R. R. Co.* v. *Public Service Comm.*, 248 U. S. 67, 70;
> *cf. Silsbee* v. *Webber*, 171 Mass. 378, 380; and
> *Rio Cape Line, Ltd.* v. *United States*, 89 Ct. Cls. 307, 315-16.

The majority of the Circuit Court of Appeals in this case have retreated to the old, abandoned concept of bodily fear or fear of injury to a near relative *only* as actionable duress. The present day concept of "business compulsion" deals with realities and provides protection for those oppressed by economic dictators (cf. 75 A. L. R., 658, 79 A. L. R. 655; 17 Am. Jur., p. 879, § 7—Doctrine of "Business Compulsion").

II.

The Circuit Court of Appeals majority have seriously misconceived the complaint, thus depriving the petitioner of its day in Court.

The instances where the majority have misapprehended the record pointed out in the motion for re-hearing (R. 224-6) will not be repeated here, but the Court is referred thereto. Two additional and important lapses by the majority deserve attention here.

The majority stated (R. 155):

> "Here there was more than a mere failure to seek Court protection; there was a deliberate choice to avoid it when the doors of justice were already open and the parties were within the temple. Such a voluntary payment cannot be duress."

The majority totally disregarded the fact (R. 130) that Hedger had moved for relief under Rule 22 of the Eastern District Admiralty Rules (Appx. *post*, p. 18) by order to show cause (R. 59) returnable before the case was called for trial; and was in court pressing its motion, under that Rule (R. 90) for relief against the abuse of process that threatened to ruin Hedger; and welcoming an orderly and deliberate trial of the issue of indebtedness that Hedger had been seeking since December.

If the judge had enforced Rule 22 as equity and Hedger demanded, the judge would have ordered Bushey to deliver a discharge of the mortgage upon deposit with Bushey by Hedger of cash or surety bond for the amount of the claim. Whereupon the bank that supplied the funds on the collateral mortgage of Hedger's fleet would have been secured, Hedger's fleet would have been back at work and the question of indebtedness could have been fully tried out in an orderly procedure. Instead, the district judge did not pass upon Hedger's motion which was still pending when the decree was signed (R. 112) but without a decision thereon ordered the trial to proceed (R. 107). Compare the equally unjustified statement (R. 156):

> "We have been cited to no case and have discovered none, where relief is accorded a suitor who runs away from court, instead of toward it."

Another critical disregard of the record is found in the last sentence of the majority opinion (R. 158):

> "Accepting the motives and intent ascribed to libellant in the petition, we can still find nothing illegal in its acts or erroneous in the Court's grant of respondent's (Hedger's) request for the consent decree and later refusal to vacate it."

Paragraph Sixty-third of the complaint alleges (R. 137) to the contrary (and is controlling since the case was being decided as on demurrer):

> "The tender described in paragraph Fifty-eighth hereof and the said consent to said decree and said delivery were made and given under said unlawful compulsion, duress and abuse of process by the libellant (Bushey) hereinbefore described and by reason of the gross fraud of the defendant (Bushey) upon the plaintiff corporation (Hedger) whereby the plaintiff corporation was deprived of the free exercise of its will in making such tender and delivery and giving such consent, all of which were without consideration and voidable, and the plaintiff corporation (Hedger) therefore hereby repudiates and rescinds said tender, delivery and consent."

Such exclusion from the consideration of the Court of facts so vital deprived the petitioner of its right to its day in Court as effectively as though the whole complaint were ignored. These merit review and relief by this Court.

Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U. S. 474, 482-3.

III.

The law of maritime liens requires delivery of a discharge of a preferred ship mortgage in an admiralty action of foreclosure thereof upon deposit of adequate security in Court to release the *res*.

Hedger's fleet was seized by Bushey in an action *in rem* to foreclose an alleged debt of $60,700 with interest and expenses (total $69,491.56).

Hedger wished to try out the issue of indebtedness in the action and offered to deposit cash with Bushey to cover (R. 93, 97) or to file a surety bond to secure the claim and release Hedger's fleet then wholly engaged in the war effort. (See Complaint, ¶40, R. 129).

Bushey refused unless relieved of an accounting (R. 129-30).

The filing of a stipulation (bond) for value in an action *in rem* relieves the *res* of the lien according to long established maritime law.

The law was stated by this Court as long ago as *United States* v. *Ames*, 99 U. S. 35, 36:

> "Bail in such a case is a pledge or substitute for the property as regards all claims that may be made against it by the promotor of the suit."

The Ship Mortgage Act, 1920, 46 U. S. C., § 951 (Appx. *post*, p. 18) makes a preferred mortgage a lien to be enforced in admiralty by suit *in rem*.

The mortgage lien is a maritime lien because, this Court said in *The Rock Island Bridge*, 6 Wall. 213 at page 215:

> "The (maritime) lien and the proceeding *in rem* are, therefore, correlative—where one exists, the other can be taken, and not otherwise."

The Ship Mortgage Act, 1920, 46 U. S. C., § 925(b) (Appx. *post*, p. 18) requires the mortgagor, upon the discharge in whole or in part of the mortgage to file a certificate of discharge with the Collector of Customs at the port of documentation of the ships. Such a certificate, to be effective, must be executed by the holder.

That is the certificate Bushey refused to deliver either for cash or upon filing a bond. Cash in the amount of the claim is obviously adequate security for the claim. Bushey's proctors induced the district judge to rule that the filing of security does not relieve the *res* of the lien but merely of the attachment (*cf.* proctors' prior contentions in *Century Indemnity Co.* v. *N. Y. Tank Barge Co.* [EDNY] 6 F. Supp. 280 and *The Morning Star* [EDNY] 5 F. Supp. 502).

It is important in the application of the Ship Mortgage Act, 1920, that the law of *U. S.* v. *Ames* (*supra*) control

as it does with all other maritime liens. The precedent established in this case is arbitrary and illogical and tends to unsettle the long settled law relative to bonding maritime liens and releasing vessels therefrom.

This statute takes the foreclosure of certain ship mortgages away from prior exclusive common law jurisdiction and places them under exclusively admiralty jurisdiction (*Detroit Trust Co.* v. *Thomas Barlum,* 293 U. S. 21).

The question then arises whether upon the entry of the consent decree, and the purpose of the admiralty jurisdiction having been wholly accomplished, the statutory admiralty jurisdiction lapsed. If so, a Bill in Equity to vacate the decree for fraud, becomes the only available remedy. This action was commenced by such a Bill (R. 116-140).

IV.

The petitioner was deprived of substantial rights when its bill in equity was ordered to be treated as a petition to vacate in the foreclosure action.

This proceeding was commenced by the filing of a Bill of Complaint in equity.

The Bill prayed relief that included elements outside the jurisdiction of an admiralty court to afford (R. 139).

> *Grant* v. *Poillon,* 20 How. 162, 168-9;
> *The Ada* (C. C. A. 2), 250 Fed. 194, 198.

A Court of Equity may vacate a judgment for fraud.

> *Freeman* v. *Howe,* 24 How. 450, 460;
> *Krippendorf* v. *Hyde,* 110 U. S. 276, 284-5.

In the absence of diversity jurisdiction lies because the action is regarded as ancillary to the action in which the decree under attack was entered.

Corey v. *Houston & T. C. Ry. Co.*, 161 U. S. 115, 130;
Pacific R. R. of Mo. v. *Mo. Pac. Ry. Co.*, 111 U. S. 505, 522.

Hedger has been deprived of remedies available to it in equity and has been forced to submit its complaint (under the procedure prescribed by the Circuit Court on the prior appeal) to the same district judge who abused his discretion in granting no relief under Rule 22. And now he has abused his discretion again by dismissing the complaint (R. 173).

That, we claim, is a clear denial of due process of law.

The contention that the statutory admiralty jurisdiction (Ship Mortgage Act, 1920) spent itself upon payment of the decree has been adverted to (*ante*, p. 15).

The question of equity jurisdiction has been presented to this Court before by Hedger on a petition for a writ of *certiorari;* No. 423, October Term, 1946, *q. v.*, which was denied. But it is thought that the denial may have been based upon lack of finality in the proceeding. For that reason it is again submitted.

V.

There is a conflict between the decision of the Circuit Court of Appeals for the Second Circuit and a decision of the Circuit Court of Appeals for the Seventh Circuit involving limitations on vacating consent decrees.

The Circuit Court of Appeals for the Seventh Circuit in the case of *Fleming* v. *Huebsch Laundry Corporation*, 159 F. (2d) 581, has applied a common sense measure to the vacating of decrees obtained by consent under circumstances indicating that the party consenting did so with-

out full realization of the facts and free exercise of the will.

In that case a laundry company prosecuted by the OPA consented to a penalty and injunction against it upon the erroneous information from an OPA official that it was in violation of OPA regulations as interpreted by the OPA. After paying one installment of the penalty the laundry company moved to set the decree aside. Relief was granted on the ground of "excusable negligence".

The decision in that case was consistent with the modern trend of the law to relieve the weak from oppression by the strong.

The action of the Circuit Court of Appeals for the Second Circuit in the case at bar is in direct conflict with that philosophy and harks back to the times when duress was recognized and relieved against only under conditions equivalent to a threat of bodily harm or kidnapping (R. 158).

It is important that this Court consider the broad subject of duress and establish a policy of relief that may serve as a guide to the federal courts.

It is respectfully requested that the petition be granted. Bushey should not escape an accounting.

HORACE M. GRAY,
Advocate for Petitioner.

June 11, 1948.

Appendix.

§ 925 (b), Title 46, U. S. Code (Ship Mortgage Act, 1920, subsec. G):

> "The mortgagor upon a discharge in whole or in part of the mortgage indebtedness, shall forthwith file with the collector of customs for the port of documentation of the vessel, a certificate of such discharge. Such collector of customs shall thereupon record the certificate. In case of a vessel covered by a preferred mortgage, the collector of customs at the port of documentation shall (1) indorse upon the documents of the vessel, or direct the collector of customs at any port in which the vessel is found, to so indorse, the fact of such discharge, and (2) shall deny clearance to the vessel until such indorsement is made."

§ 951, Title 46, U. S. Code (pertinent portion, first three sentences) (Ship Mortgage Act, 1920, subsec. K):

> "A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively."

Admiralty Rule XXII—U. S. District Court, Eastern District of New York:

> "In case of the attachment of property, or the arrest of the person (except in suits for seamen's wages when the attachment is issued upon certificate pursuant to Sections 4546 and 4547 of the Revised Statutes), the party arrested, or any person having a right to intervene in respect of the thing attached, may, upon evidence showing any improper practice or a manifest want of equity on the part of the libellant, have an order from the judge requiring the libellant to show cause *instanter* why the arrest or attachment should not be vacated."

IN THE

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OCTOBER TERM—1948

No. 96

W. E. HEDGER TRANSPORTATION CORPORATION,
Petitioner,

against

IRA S. BUSHEY & SONS, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER E. HECKMAN,
Counsel for Respondent.

JUDICIAL PRINTING CO., INC., 82 Beekman St., New York—BEekman 3-9084-5-6 182

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Stripped of exaggeration and fanciful interpretation to which at times they have been subjected, the facts shown by the Record are simple and do not involve any important question.

Following the procedure established by Congress (46 U. S. C. A. 951) respondent instituted an Admiralty suit *in rem* in the District Court, Eastern District of New York to foreclose a statutory preferred ship mortgage (46 U. S. C. A. 922) on various of petitioner's vessels given by petitioner as security for a debt on which respondent alleged a balance due and owing from petitioner (R. 57,* *cf.* C. C. A. opinion, R. 144).

* References are to pages of the Transcript of Record.

Pursuant to Admiralty Rule 10 process *in rem* was issued and most of the vessels were seized by the Marshal. As the Circuit Court opinion states (R. 144):

> "This is not only usual, but it is also the only way of proceeding in the case of these mortgages * * *."

Petitioner appeared by an attorney admitted to practice in this Court and filed answer alleging in substance that there was no longer anything due under the mortgage and asking an accounting (R. 63-74, *cf.* C. C. A. opinion, R. 145).

Petitioner made no attempt to effect the release of its vessels by complying with the provisions of either 28 U. S. C. A. 754, Admiralty Rule 12 or E. D. N. Y. Admiralty Rule XXI (*cf.* C. C. A. opinion, R. 146). Under local rule, considering the risk and expense of the Marshal's custody of 32 vessels the Court granted a motion for immediate trial made by respondent and not by petitioner although the latter proclaims an anxiety to obtain a decision (R. 58, *cf.* C. C. A. opinion, R. 146).

The case was called for trial March 7, 1945 (R. 59). Then began a colloquy which covers pages 81 to 112 of the Record and is described in the Circuit Court's opinion (R. 145-149). It ended when, after petitioner made various conditional propositions seeking to escape a trial, the taking of evidence began (R. 107) and petitioner made a formal tender in open Court, of the amount of respondent's demand (R. 108) conditioned only on receiving proper recordable satisfactions of the mortgage (R. 108). When petitioner was asked for the amount tendered it developed that such sum was to be paid by a third party only *after* satisfactions had been filed so that a new mortgage could be delivered by petitioner to such third party and recorded as a first preferred mortgage simultaneously with payment (*cf.* R. 108-109, wherein Mr. Tibbetts represented the third party.) To accommodate petitioner in the filing of

the satisfactions of the mortgage under foreclosure and in the recording of the new first mortgage to the third party, respondent's counsel accompanied petitioner's attorney to the Customs House to expedite the recording. Next morning the parties appeared before the Trial Judge where petitioner's attorney asked the Court to enter a final decree (judgment) against petitioner on the tender made the previous day. The Record reads (R. 111):

> "Mr. Gray (petitioner's attorney): Your Honor, *we are ready* to have your Honor sign a decree under our tender of yesterday afternoon.
>
> The Court: As I understand it now, the satisfactions have all been recorded and filed in the Customs House?
>
> Mr. Gray: No, sir, the satisfactions are being held over in the Customs House together with the mortgage. As soon as your Honor signs this *consent decree* then Mr. Heckman (respondent's attorney) will consent to a discontinuance of the action upon the payment of costs to the Marshal and we will then go to the Marshal's office and turn the money over.
>
> Mr. Heckman: That is not just it. I will ask the Court to sign this decree which provides for a recovery. I will sign this (the discontinuance) in the Marshal's office when you turn over the money.
>
> Mr. Gray: *That is all right.* Then the Marshal has to 'phone to the Collector of the Customs so as to release the vessels and then the mortgage and the satisfactions will be duly recorded.
>
> The Court: All right. I am now signing the order." (Italics supplied.)

The decree appears at pages 57 to 59 of the Record.

Later, petitioner brought a suit in equity to vacate the decree which it had presented to the Court and which, without reservation or protest, it had asked the Court to sign, alleging the conclusion, unsupported by factual allegations, that the decree was obtained by fraud and duress

(R. 116-140). This was dismissed for lack of jurisdiction. On petitioner's appeal the Circuit Court directed that the complaint should be deemed a petition to vacate the decree in the foreclosure suit in Admiralty, *W. E. Hedger Transportation Corporation* v. *Ira S. Bushey & Sons* (155 F. (2d) 321), and this Court denied certiorari 329 U. S. 735. After filing the mandate (R. 59) the complaint—deemed a petition to vacate the final decree—was considered by the Judge who heard the trial and signed the decree (R. 60). After a thorough and painstaking examination he denied and dismissed the petition (R. 60, Opinion, R. 7-24). By this application petitioner seeks review of the Circuit Court's decision affirming the denial and dismissal of that petition.

POINT I

The petition to vacate does not show facts constituting fraud; all facts alleged were known to petitioner before the tender and consent.

Conclusory allegations are not sufficient when fraud is asserted.

> *McCampbell* v. *Warrich Corp.*, 109 F. (2d) 115;
> *Davis* v. *State Bank of Woodstock*, 151 F. (2d) 180, *cf.* 9(b) F. R. C. P.

Facts known, or discoverable by diligence, before decree enters will not serve as ground for an application to vacate it.

> *The New England*, Fed. Case No. 10,151;
> *The Hewitt*, 15 F. (2d) 857;
> *Simkins Federal Practice Rev. Ed.* (1923), Chap. CXXI, p. 883.

Petitioner's application to vacate the decree does not charge extrinsic acts, it refers only to respondent's steps *in Court* in the litigation as acts of fraud, duress, abuse of process, etc.

As the transcript of docket entries on pages 57 to 62 of the Record shows, every step by respondent which preceded the consent decree was taken in accordance with the Admiralty Rules promulgated by this Court, supplemented by local practice rules, in the Court to which Congress granted exclusive jurisdiction in that type of case. As the Circuit Court so aptly said (R. 146):

> "The normal form of such duress is by steps taken to prevent a litigant from reaching a court to protect his interests. Here the situations are reversed. At all times the party accused of the abuse is endeavoring to get before the judge and to have the case thoroughly heard, while the party who claims to be the victim has strenuously opposed such judicial hearing."

Since its request to the Court to sign a final decree formally merging in to a judgment petitioner's admission of its liability made during trial in open Court, where it had every opportunity to present its evidence, petitioner has twice taken respondent through the Circuit Court of Appeals and this is its second attempt to gain this Court's aid in escaping the effect of that consent judgment. Its reasons, we submit are obvious. It deliberately avoided an early opportunity for a trial on the merits. It seeks to gain by indirection what it could not accomplish in the original suit, *viz.*, secure a concession of part of its debt by harassing respondent with litigation until respondent makes a settlement payment to end seemingly interminable litigation.

The Ship Mortgage Act of 1920 was passed to improve the shipping market by providing an enforceable mortgage where none existed before (*The Thomas Barlum*, 293 U. S.

21, 42). That statute may as well be stricken from the books if a defaulting mortgagor may prevent foreclosure by starting a suit for an accounting in a State Court. As this Court said in the *Thomas Barlum, supra*:

> "If a mortgage is within the Act, there can be no suit to foreclose it in a State Court;"

If petitioner was entitled to an accounting it could and should have been had in the Admiralty foreclosure proceeding *W. E. Hedger Transportation Corp.* v. *Ira S. Bushey & Sons,* 155 F. (2d) 321, cert. denied, 329 U. S. 735.

Certainly it cannot be abuse of process to resort to the only process fixed by statute and to do so openly and expeditiously before duly appointed judges whose error if any could be corrected by direct appeal. Petitioner had its day in Court and at the end of that day confessed its liability and on the following day asked the Court to adjudicate such liability by entering judgment against it.

No tender of judgment, consent decree or settlement will be acceptable to any plaintiff if the defendant may successfully vacate it by alleging only that it was made to escape a long and expensive lawsuit with resulting inconvenience, which is the petitioner's real contention here.

As this Court pointed out in *United States* v. *Ames,* 99 U. S. 35, a claimant wishing to avoid the inconvenience of having a vessel detained during litigation may apply to the Court to have the property released on giving bond. Petitioner never did that.

The Circuit Court further stated (R. 157):

> "The district judge directly familiar with the facts had refused to act after a very careful re-examination of the entire case, and his decision, so far as it was discretionary, was final * * *.
>
> "Since all the facts are now fully known, there is no occasion for a trial or for the taking of tes-

timony. It is as much the duty of the Court to protect litigants from long and utterly useless litigation as it is to afford an opportunity for trial to those deserving it. And while a Court will be astute to prevent misuse of its processes, it can hardly be expected to look with favor upon the device of obtaining postponement of effective trial by seeking a decree to be repudiated after its immediate objective has been obtained" (R. 158).

POINT II

The Circuit Court of Appeals properly affirmed the dismissal of the petition for review.

After reviewing the facts shown by the Record before it, the Circuit Court said (R. 152):

> "Nevertheless on this appeal respondent asks us to discount the history of the case as thus clearly disclosed by applying the well known and useful rule that upon dismissal of a pleading upon motion all intendments are taken in favor of the pleader, in the endeavor to support the allegations so far as possible. The difficulty with this is that it is controlled by a presently more important, apposite, and well settled principle of law that the petition must be read as though it included the facts of which the Court takes judicial notice, even though these may be contrary to some of the allegations."

POINT III

Petitioner was not entitled to a satisfaction of the mortgage before payment.

Petitioner argues that when a bond is filed in a foreclosure proceeding the mortgage must be satisfied even though the mortgagor receives no money.

If that be so then a mortgagee can be forced to accept a substitute for the security he demanded when the loan was made. Banks will not be willing to let others decide what security they shall have for the loan of their depositors' money.

United States v. *Ames*, 99 U. S. 35, cited by petitioner shows why a mortgage contract is not satisfied by substituting a bond for the mortgaged *res*. In that case the sureties on the bond became insolvent and the judgment was never paid. A person suffering the consequences of a tort must of necessity take his chances of collecting damages but a party who loans money with a vessel as security is entitled to the security of his own choosing, not some substitute therefor. If the rule be otherwise the purpose of the Ship Mortgage Act will be frustrated.

However, the point is not involved here. Petitioner never filed a bond and so cannot be heard to argue what its rights might have been in a situation which never existed. Moreover, by proper motion at the appropriate time, petitioner could have obtained a ruling on its asserted rights. Its own failure to take the proper procedural steps is not ground to vacate a decree after entry.

POINT IV

This Court has already declined to grant review of petitioner's contention that its bill in equity should not have been treated as a petition to review.

The first decision of the Circuit Court held that the bill or complaint in equity should not have been dismissed for lack of jurisdiction but should have been deemed as a petition to review (*W. E. Hedger Transportation Corp.* v. *Ira S. Bushey & Sons*, 155 F. (2d) 321). This Court denied petitioner's application for a writ of certiorari, 329 U. S. 735.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Counsel for Respondent.